

NUMBER 77-593

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

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UNITED STATES OF AMERICA

V.

LEROY SORRELL

---

UNITED STATES OF AMERICA

V.

LOUIS THOMPSON

---

ON PETITIONS FOR WRITS OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

---

JOINT BRIEF OF RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The opinions of the Courts of Appeals (Government's App. A) are reported at 562 F.2d 227. The opinion of the District Court in Sorrell (Government's App. E) is reported at 413 F. Supp. 138. The opinion of the District Court in Thompson (Government Petition, App. F) is unreported.

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JURISDICTION

The judgments of the Court of Appeals were entered on August 22, 1977, and on September 13, 1977, that Court issued a certified judgment in lieu of mandate. On September 16, 1977, the District Court filed an order dismissing the indictment in Thompson (App. A). The Government has filed no notice of appeal from that order, which accordingly became final on October 18, 1977. A petition for certiorari was filed on October 21, 1977. The Government seeks to invoke the jurisdiction of this Court pursuant to 28 U.S.C. §1254(1). While Respondent Sorrell does not contest jurisdiction, Respondent Thompson asserts that his case is moot and that therefore this Court lacks jurisdiction as to him (see infra).

QUESTIONS PRESENTED

1. Whether the Government may deprive a state prisoner of his right under the Interstate Agreement on Detainers not to be needlessly shuttled between state and federal custody without trial merely by employing the writ of habeas corpus ad prosequendum.

2. Whether a state prisoner who was taken into federal custody and returned to state prison without trial may be denied the remedy provided by Article IV(e) of the Interstate Agreement on Detainers solely because his period of federal custody lasted no more than one day.

3. Whether the Government's failure to timely appeal the dismissal of the indictment against Respondent Thompson renders the Petition for Certiorari in his case moot.

STATUTES INVOLVED

1. In addition to those provisions of the Interstate Agreement on Detainers Act, 84 Stat. 1397-1403, 18 U.S.C. App., quoted in the Government's Petition, Respondents believe the following portions to be relevant:

ARTICLE V

(d) The temporary custody referred to in this agreement shall be only for the purpose of permitting prosecution on the charge or charges contained in one or more untried indictments, informations, or complaints which form the basis of the detainer or detainers or for prosecution on any other charge or charges arising out of the same transaction. Except for his attendance at court and while being transported to or from any place at which his presence may be required, the prisoner shall be held in a suitable jail or other facility regularly used for persons awaiting prosecution.

\* \* \* \*

(f) During the continuance of temporary custody or while the prisoner is otherwise being made available for trial as required by this agreement, time being served on the sentence shall continue to run but good time shall be earned by the prisoner only if, and to the extent that, the law and practice of the jurisdiction which imposed the sentence may allow.

(g) For all purposes other than that for which temporary custody as provided in this agreement is exercised, the prisoner shall be deemed to remain in the custody of and subject to the jurisdiction of the sending State and any escape from temporary custody may be dealt with in the same manner as an escape from the original place of imprisonment or in any other manner permitted by law.

(h) From the time that a party State receives custody of a prisoner pursuant to this agreement until such prisoner is returned to the territory and custody of the sending State, the State in which the one or more untried indictments, informations, or complaints are pending or in which trial is being had shall be responsible for the prisoner and shall also pay all costs of transporting, caring for, keeping, and returning the prisoner \* \* \*.

2. Section 7 of the Interstate Agreement on Detainers provides:

§7. Reservation of right to alter, amend or repeal

the right to alter, amend, or repeal this Act is expressly reserved.

STATEMENT

Respondents are satisfied with the Statement in the Government's Petition with the exception of the additional facts included in the section entitled "JURISDICTION", supra.

REASONS FOR DENYING THE WRIT

Petitioner contends that certiorari should be granted in these two cases to conform their disposition with that of United States v. Mauro, 544 F.2d 588 (C.A. 2, 1976), certiorari granted October 3, 1977, No. 76-1596, and United States v. Ford, 550 F.2d 732 (C.A. 2, 1977), certiorari granted October 3, 1977, No. 77-52. In support of this position the Government alleges the presence of two issues requiring consideration. Since neither constitutes a substantial question of law warranting review by this Court, the petitions should be denied. In the case of Thompson the petition should also be denied because that case is moot.

1. The Government first argues that Article IV(e) of the Interstate Agreement on Detainers is inapplicable to transfer of state prisoners into federal court accomplished with the federal writ of habeas corpus ad prosequendum. It attempts to buttress this claim by pointing out, inter alia, (1) that the Agreement provides no new benefit to the United States as a "sending state" in light of the pre-existing writ of habeas corpus ad prosequendum; (2) that language in Article IV(c), dealing with speedy trial in the demanding jurisdiction, limits its application to proceedings "made possible" by Article IV; (3) that there are inconsistencies in the time limitations for trial of prisoners between the Agreement and the Speedy Trial Act of 1974; 18 U.S.C. §3161 et seq., and (4) that a prisoner in another state may still demand trial under Article III.

The fatal weakness in all of these arguments is that they fly in the face of the Agreement's plain language and ignore the clear fact that the writ of habeas corpus ad prosequendum itself was intended to have only limited application. The Agreement unambiguously provides that when a member state receives a

prisoner from a state in which he is serving a sentence, the prisoner may not be returned to the sending state without trial. Given the fact that Congress enacted Article IV of the Agreement (and clearly it need not have, see Section 7 of the Agreement), it obviously was intended to have meaning. However, the Government would have this Court sanction its facile evasion and effective repealer in the name of the writ of habeas corpus ad prosequendum, and in spite of the fact that use of the writ is expressly limited to situations where it is "necessary". 28 U.S.C. §2241(c)(5).<sup>\*/</sup>

The interpretation of the Agreement by the Court of Appeals in these cases likewise does no violence to the Speedy Trial Act. Like the writ of habeas corpus ad prosequendum, the Speedy Trial Act's provisions retain exclusive applicability where the sending state is not a party to the Agreement. In any event, later legislation should not be employed to infer intent on the part of a previous Congress which conflicts with the unambiguous language of its enactments. See Callahan v. United States, 364 U.S. 587 (1961).

Moreover, a decision by this Court in favor of the writ of habeas corpus ad prosequendum and against the Agreement would have repercussions far beyond those evidently anticipated by the Government. In that case numerous states would be entitled to make the same claim that their legislatures did not really

<sup>\*/</sup> The Government quotes this Court's opinion in Carbo v. United States, 364 U.S. 611, 618 (1961), for the proposition that the writ is a "necessary \* \* \* tool for jurisdictional potency as well as administrative efficiency." The same can not be said, however, where the Agreement is now available to the federal courts.

mean to cut back on their time-honored writs of habeas corpus in passing identical versions of the Agreement. See United States ex rel. Esola v. Groomes, 520 F.2d 830 (C.A. 3, 1975); Smith v. Hooey, 393 U.S. 374 (1969). Thus the sentenced federal prisoners whom the Government says Congress intended to protect by enacting the Agreement would be subject to the same needless shuttling back and forth to state courts as suffered by Messrs. Sorrell and Thompson in the cases at bar. The Government would certainly be in a poor position to object, especially since the Compact Clause, United States Constitution, Art. I, Section 10, cl. 3, would seem to oblige this Court to accept the argument in favor of the writ of habeas corpus ad prosequendum when advanced by the states.<sup>\*/</sup>

2. The Government further contends that certiorari should be granted in order to enable this Court to rule that one day transfers between states without trial do not violate the Agreement. In support of this position it points to United States v. Chico, 558 F.2d 1047 (C.A. 2, 1977), petition for

<sup>\*/</sup> The Interstate Agreement on Detainers constitutes an interstate compact consented to by Congress, Act of June 5, 1934; 4 U.S.C. §112(a); Sen. Rep. No. 91-1356, 91st Cong., 2d Sess. (1970), 3 U.S. Code Cong. & Ad. News P. 4866 (1970); and therefore a federal law subject to enforcement by federal courts on application by state prisoners pursuant to 28 U.S.C. §2254. Delaware River Joint Toll Bridge Commission v. Colburn, 310 U.S. 419 (1940); Petty v. Tennessee-Missouri Bridge Commission, 359 U.S. 275 (1959); United States ex rel. Esola v. Groomes, 520 F.2d 830, 840 (C.A. 3, 1975) (concurring opinion by Garth, J.); Beebe v. Vaughn, 430 F.Supp. 1220 (D. Del. 1977).

certiorari filed November 10, 1977, No. 77-5706, wherein that Court held that such shuttling did not interfere with rehabilitative programs and did not amount to "imprisonment" in the demanding jurisdiction within the meaning of the Agreement.

The Third Circuit rejected this first assertion, noting that there was prejudice inherent in Sorrell and Thompson from difficulties encountered by counsel in communicating with these state-held prisoners. Moreover, it refused to engraft an ad hoc inquiry into prejudice on a statute which clearly did not provide for it.<sup>\*/</sup> The second claim is also without support. The Agreement clearly draws a distinction between the "place of imprisonment" in the sending state and "temporary custody" in the demanding state. Articles IV(a), and V(d), (f), (g) and (h). Thus whatever the definition of "imprisonment"<sup>\*\*/</sup> might be, all that is necessary to trigger the remedial provisions of the Agreement is for the United States to secure "temporary custody" of a state prisoner. This was unquestionably done in the cases of Sorrell and Thompson and so the Agreement must apply to them.

<sup>\*/</sup> Certainly the statute does not require a defendant to show that his prison programs have been hampered by violations of its terms, and thus the absence of such interference may not be presumed. Petitioner's claim that there are no rehabilitative programs at Holmesburg prison (where Thompson was serving his sentence) (Petition, P. 14) has no support in the record, but is drawn only from Judge Weis' dissent, where he assumes the absence of such programming.

<sup>\*\*/</sup> Webster's Third New International Dictionary defines "imprisonment" as "constraint of a person either by force or by such other coercion as restrains him within limits against his will." Thus, custody in a holding cell in a federal courthouse would appear to be an "imprisonment."

In this regard it should also be noted that were this Court to adopt the Government's position here, it would be compelled by the Compact Clause to sanction repeated transfers between Camden and Philadelphia, New York and New Haven, and any other similar shuttling which, although it might be totally disruptive of a prisoner's rehabilitative progress and a serious impediment to adequate representation by counsel, would be protected by this tortured interpretation of the statute.

3. The Government's petition for certiorari in Thompson should also be denied because that case is moot, the Government having waived its right to appeal from dismissal of the Thompson indictment.

The Court of Appeals filed its en banc judgment on August 22, 1977, and on September 13, 1977 issued a certified judgment in lieu of mandate pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure. The Government requested neither a stay of the mandate nor its recall. On September 16, 1977 the District Court entered an order dismissing the Thompson indictment (Appendix "A"). The Government neither moved to reconsider that order nor filed a timely appeal from it.

It is well settled that the timely filing of a notice of appeal is both mandatory and jurisdictional. See, e.g., United States v. Robinson, 361 U.S. 220 (1964). It is also clear that the jurisdiction of the courts of the United States, including the Supreme Court, is limited to actual cases and controversies; it does not extend to those causes where a decision would not affect the rights of the parties. United States Constitution, Art. III, Section 2; Securities & Exchange Commission v. Medical Committee for Human Rights, 404 U.S. 403, 406-07 (1972); Benton v. Maryland, 395 U.S. 784, 788 (1969). On October 18, 1977, the Government having chosen not to appeal or having ne-

glected to appeal, the September 16, 1977, order dismissing the indictment became final. This waiver constitutes acquiescence in the September 16, 1977, order of dismissal and since that order is now final and non-appealable there no longer exists a justiciable case or controversy.

When a court can provide no remedy there exists no appellate jurisdiction. For example, in Jones v. Montague, 194 U.S. 47 (1904), the Court was asked to review the denial of an order enjoining an election. Because the election had already taken place and the Congressmen seated in the House the Court held the appeal moot and dismissed the cause. Similarly, the Courts of Appeals have held that the execution of a civil judgment renders an appeal moot. Maddox v. Black, Raber-Kief & Assoc., 301 F.2d 904 (C.A. 9, 1962); Continental Can Co., Inc. v. Graham, 220 F.2d 420, 423 (C.A. 6, 1955).

The Thompson case is indistinguishable from those decisions. Were this Court to grant plenary review and reverse, it would only be advising the Court of Appeals that its en banc judgment was incorrect. The indictment could not be reinstated because of the final unappealed order of September 16, 1977, and there could be no reindictment because Article IV(e) of the Interstate Agreement specifies that such dismissals are "with prejudice."

The Government cannot breath life back into the Thompson case merely by filing a petition for a writ of certiorari in this Court.<sup>\*/</sup> To rule otherwise would be to ignore the important policy considerations underlying the time requirements for con-

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<sup>\*/</sup> The petition was filed on October 21, 1977, three days after the dismissal order became final.

testing the action of an inferior court. As was stated in Matton Steamboat Co. v. Murphy, 319 U.S. 412, 415 (1943):

The purpose of statutes limiting the period for appeal is to set a definite point of time when litigation shall be at an end, unless within that time the prescribed application has been made; and if it has not, to advise prospective appellees that they are freed of the appellant's demands. Any other construction of the statute would defeat its purpose.

This case ended on October 18, 1977. The Government's petition for a writ of certiorari must therefore be denied.

CONCLUSION

The respondents respectfully request that the petition for writs of certiorari be denied for the foregoing reasons.

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ENTERED: 9/16/77

CLERK OF COURT

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA :

v. :

CRIMINAL NO. 76-22

LOUIS THOMPSON :

**FILED**

O R D E R

**SEP 15 1977**

JOHN J. HARDING, Clerk

This 15th day of September, 1977, pursuant to the ~~by~~ <sup>Dea Clerk</sup>  
Mandate of the Court of Appeals for the Third Circuit issued  
on September 13, 1977, it is

ORDERED that the above captioned indictment is  
DISMISSED.

*Alfred L. Lingo*  
J.